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1 didn't know about that at the time. If they didn't know about
2 it, they can't be charged with it, isn't that right?

3 MR. HANTMAN: I think discovery would show that they
4 knew about all of this because it was happening on a daily
5 basis. Our client constantly --

6 THE COURT: Never mind about constantly. The one
7 thing that you have cited to me that may be a constitutional
8 deprivation is the refusal to let him fly unless he dropped his
9 lawsuit, if that's what happened. And unless the trust knew
10 about it, you can't hold the trust responsible for that
11 refusal.

12 MR. HANTMAN: Let me say this.

13 THE COURT: No. I have given you enough opportunity.
14 Thank you.

15 I understand your position -- I shouldn't say I
16 understand it. It is not very clear. But the clearest I can
17 draw from it is that, since you are arguing deprivation of due
18 process of law, the only thing I can find in your allegations
19 that might be a deprivation of due process of law is, if under
20 color of state law the state threatened you, that you had to
21 drop your lawsuit or you wouldn't be able to fly from that
22 heliport, and I take it that the defendant agrees that might be
23 a constitutional tort.

24 MR. FRIEDMAN: Your Honor, I have to agree with that
25 part. They were terminated on May 7, 2007. That is less than

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1 a year ago. They were terminated because it was a settlement
2 agreement with an earlier lawsuit that they will not solicit
3 passengers on the tarmac because it is dangerous. No
4 solicitation. We sent them a letter. You are soliciting -- an
5 absolute right to stop him.

6 There was a hearing in state court. We have concluded
7 this. They made the same allegation to the state court judge,
8 and the state court judge found that our witnesses were
9 credible. I include this as an appendix to our brief in saying
10 that the reason why is because they did solicit.

11 We didn't get any letters. We terminated them for a
12 very specific reason. A state court judge found for us. We
13 are going to argue Colorado River abstention.

14 It is all over in state court. Everything that they
15 have talked about is already over in state court in an Article
16 78 proceeding. If that's their main argument, it is already
17 being determined across the street.

18 The dates that they are talking about simply don't
19 correspond. They were terminated May 7, 2007 for soliciting on
20 the tarmac where they were not supposed to. It was a specific
21 provision from an earlier settlement agreement from an earlier
22 lawsuit. So there were lawsuits because they didn't pay and
23 then we settled. We said OK you can come back, but no
24 solicitation. They continued to solicit. We terminated them.
25 You can allege anything you want, but the state court judge

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1 found that they did not prove there was any other basis for the
2 termination other than their solicitation.

3 THE COURT: Why aren't you bound by that finding?

4 MR. HANTMAN: Number one, our client doesn't agree
5 with it, and I understand that it is on appeal.

6 THE COURT: That is something else. You are saying,
7 until the appellate court rules on it, it is not technically
8 res judicata.

9 MR. HANTMAN: Obviously, Mr. Friedman would bring
10 out --

11 THE COURT: I'm sorry? I didn't hear that.

12 MR. HANTMAN: University of Texas v. Walter Camenisch.
13 101 S.Ct. 1830, 451 U.S. 390. I have a copy for the Court and
14 Mr. Friedman if he would like a copy. In that case it talks
15 about a party that --

16 THE COURT: What were the facts of that case?

17 MR. HANTMAN: It talks about --

18 THE COURT: Cases are not sentences. They are
19 collections of facts.

20 MR. HANTMAN: It talks about injunctive relief.

21 THE COURT: You have to know the facts to know what
22 they were talking about.

23 MR. HANTMAN: A preliminary injunction was granted to
24 require a state university to provide an interpreter, but
25 plaintiff was required to file a bond in the state appeal. The

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1 issue before the Court of Appeals was not who should pay for
2 the interpreter but whether the district court abused
3 discretion in granting preliminary relief. And the question of
4 who should pay was a question for the district court to decide
5 in the first instance.

6 THE COURT: What has that got to do with this?

7 MR. HANTMAN: In that case it mentioned that a court,
8 it held that the purpose of preliminary injunction is merely to
9 preserve relative positions of parties until trial on the
10 merits can be held and that a party is not required to prove
11 its case in full at a preliminary injunction hearing.

12 THE COURT: We don't have a preliminary injunction
13 here.

14 MR. HANTMAN: It was a preliminary injunction. It
15 wasn't a finding on the merits, just whether a preliminary
16 injunction should be granted. And it mentioned a Supreme Court
17 case, findings of fact.

18 THE COURT: There is no question that is not a final
19 judgment, a determination of preliminary injunction. That is
20 why it is called preliminary.

21 MR. HANTMAN: Our position is, whatever happened
22 there, it certainly is not binding on the merits and,
23 therefore, it shouldn't be considered by this Court on a
24 separate issue.

25 THE COURT: It is clearly not a res judicata point.

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1 What is being argued by the defendant is that I should
2 defer to the state court because it is already halfway decided
3 in the state court.

4 MR. HANTMAN: Well, actually --

5 THE COURT: If I were satisfied that it was a federal
6 constitutional issue, I wouldn't defer. The question is, is
7 this a federal constitutional issue because that is the only
8 ground on which you are in this court.

9 MR. HANTMAN: Obviously, even the judge in the state
10 court agrees with what you said because he states in his
11 decision, which Mr. Friedman attached here, there is further
12 litigation between the parties pending in federal court, so he
13 knew about the federal action.

14 And, apparently, there was some effort made to settle
15 this proceeding as well as the federal court action in the
16 universal settlement. Unfortunately, these efforts failed. To
17 the extent that Mr. Friedman thought that somehow this Court
18 should abstain from listening --

19 THE COURT: Let's not get sidetracked.

20 I haven't yet gotten an answer to my question, which
21 is, if the trust didn't know that he was told that if you drop
22 your lawsuit, we will let you back in, how can I possibly hold
23 that the trust violated a constitutional right of your client?

24 MR. HANTMAN: Your Honor, at this point I suggest that
25 we have some discovery, because I think we can prove that the

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1 HRPT did know.

2 THE COURT: Not only knew --

3 MR. HANTMAN: Not only knew and did nothing, but
4 approved, collaborated and participated with Air Pegasus --

5 THE COURT: In what?

6 MR. HANTMAN: In order to kick our client out, because
7 he was creating problems there by complaining about what he
8 felt was discriminatory activity.

9 THE COURT: That's what you are saying.

10 MR. HANTMAN: Of course that's what we are saying.
11 All we want is simply an opportunity to get behind a motion to
12 dismiss.

13 THE COURT: That is the only possible due process
14 claim that you are making, that the trust, in effect, threw him
15 out of the heliport because he brought a lawsuit. That is a
16 very tough position to have to prove.

17 MR. HANTMAN: If we didn't think we could prove it,
18 the lawsuit wouldn't have been brought.

19 THE COURT: I understand you thought a lot of things.

20 MR. HANTMAN: Mr. Friedman talked about other
21 lawsuits. There is a lawsuit from The Friends of the Hudson
22 River Park, and they brought a lawsuit on the Article 78
23 allegations.

24 THE COURT: What has that got to do with anything?
25 They don't like the heliport being in the park, right?

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1 MR. HANTMAN: That's correct too.

2 THE COURT: So that's not good for your client. Your
3 client wants to fly from there.

4 MR. HANTMAN: That's why we limited what we are
5 looking for here.

6 THE COURT: Of course you wouldn't assert a claim for
7 something affirmatively you don't want?

8 MR. HANTMAN: The real critical issue here, your
9 Honor, not to belabor it -- and you will certainly make the
10 decision as to whether we have stated a constitutional issue --
11 but the bottom line here is that you have one airport, one
12 heliport in the middle of the city. Our client is losing
13 \$40,000 every weekend.

14 He has an affidavit he submitted. He made application
15 here for preliminary injunction which your Honor denied at that
16 time because perhaps it was premature and you didn't have all
17 of the information, but as a basic matter -- and this is really
18 the bottom line -- here is someone whose life is helicopters.
19 He just bought another helicopter. There is no reason that he
20 shouldn't be able to land at West 30th Street --

21 THE COURT: That is not what this suit is about. To
22 come into federal, this suit is a claim that the trust deprived
23 your client of a constitutional right of due process of law.
24 And the only thing that you allege that comes close to an issue
25 of due process is that he was thrown out of the heliport

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1 because he brought a lawsuit. You have to connect that with
2 the state actor, which is the trust. The heliport is not a
3 state actor. The trust is the closest to a state actor that
4 you've got. So you need to show that the trust deprived him of
5 a right under the due process clause, deprived him of due
6 process of law.

7 MR. HANTMAN: That is correct, but we do believe that
8 Air Pegasus is a state actor too.

9 THE COURT: I know you believe that.

10 MR. HANTMAN: But the bottom line, I just want to make
11 it clear, that there is a real injury here.

12 THE COURT: That is not what I am asking you. You
13 don't come into federal court because you have a real injury.
14 You come into federal court because you have a federal injury.

15 MR. HANTMAN: We believe that we have stated one and
16 we need discovery to go further. There has been no discovery.
17 We need discovery to the extent that our allegations may not
18 have the clarity that would make it a little bit easier for the
19 Court to decide --

20 THE COURT: Just a moment. We require people to
21 investigate their claims before they bring them. That's what
22 it means to sue in good faith. You cannot come into court and
23 say, I think maybe something happened and I want to find out
24 what it was so I am bringing a lawsuit.

25 MR. HANTMAN: We have the HRPT's audit.

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1 THE COURT: The audit has nothing to do with the
2 threat over the lawsuit. That is an entirely different
3 grievance which has nothing to do with the Constitution of the
4 United States. You are suing under a federal statute that
5 prohibits a person acting under color of state law from
6 depriving your client of a constitutional right. And that's
7 what I am groping for, what constitutional right was he
8 deprived of. And the closest you come is the allegation that
9 he was thrown out of the heliport because he brought a lawsuit
10 against the heliport.

11 MR. HANTMAN: Lawsuit and the letter, the two.

12 THE COURT: What letter?

13 MR. HANTMAN: The previous letter that he had written
14 to, and I think it was to --

15 THE COURT: What has writing a letter got to do with a
16 constitutional deprivation?

17 MR. HANTMAN: Because that is one of the reasons why
18 he was kicked off, clearly, because he wrote a letter. The man
19 was complaining that he was not getting fair treatment. He was
20 being discriminated in favor of Zip. Zip, we contend, has some
21 affiliation with Air Pegasus. HRPT knows that Zip has an
22 affiliation with them because they even observed that there was
23 an affiliation. We believe that there has been collusion
24 between HRPT and Air Pegasus to favor Zip Aviation which is
25 working with Air Pegasus --

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1 THE COURT: You have to make that into a
2 constitutional violation, and I haven't yet heard it.

3 We are really spending lot of time on going round and
4 round on this. I want you to focus only on your motion to
5 dismiss complaint.

6 MR. FRIEDMAN: First, can I get rid of some of the
7 side issues? They have five Article 78 claims, and this Court
8 can't hear an Article 78. They never made an effort to defend
9 that and they continued to keep it in their complaint. The
10 Airline Deregulation Act, you have to have a law or regulation.
11 There is no law or regulation at issue here. The Supreme
12 Court --

13 THE COURT: The airlines were deregulated some time
14 ago.

15 MR. FRIEDMAN: I understand that, but they still put
16 it in their complaint. This is the third complaint that they
17 have tried to do this. The Supreme Court said a private
18 contract between individuals not covered by the Airline
19 Deregulation Act, and that is on page 29. So that is out.

20 Then they have a Commerce Clause argument that this
21 violates the --

22 THE COURT: That doesn't arise under 1983.

23 MR. FRIEDMAN: Absolutely. All of those are out. We
24 are only on state action. I assume that you have already
25 thought that Air Pegasus is not a state actor.

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1 If I could just bring one more case to your attention
2 let me just give you the citation, 318 F.3d 105, the Cranley
3 case. And this is on page 112, 318 F.3d 112, long discussion:
4 "Merely because a private entity is afflicted with the public
5 interest or is subject to extensive state regulation doesn't
6 make it a private state actor, nor is a private entity a state
7 actor where its conduct is directly compelled by the state or
8 merely permitted by the state."

9 So it is a very good Second Circuit decision that goes
10 through all of the entwinement decisions. We are not a state
11 actor.

12 Now, theoretically, the only thing I have heard is
13 First Amendment retaliation. There is not a word of First
14 Amendment retaliation anywhere in the complaint. And worse
15 than that, there is not a record that Hudson River Park Trust
16 retaliated. They said, let's have discovery and they never
17 make that allegation -- never.

18 If I may say so, they are thrusting around for
19 something, but they have to put it in their complaint. They
20 haven't put it in their complaint. It is a little hard, out of
21 the atmosphere, to grab that when they make no allegation.

22 And the sequence of events were, we had the
23 settlement. We, Air Pegasus, had the settlement. They are not
24 supposed to solicit. They solicited. We sent them a letter.
25 You are out.

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1 And then we have a hearing in state court where we say
2 that the reason we did it was because you solicited, and the
3 state judge in the preliminary injunction hearing finds that
4 there was sufficient evidence that they did solicit, found our
5 witnesses credible, their witnesses not credible and refused to
6 issue the injunction.

7 And that state case which is a 2006 case, your Honor,
8 which predated this case is still alive. Theoretically, we can
9 go across the street -- they haven't done anything in the case
10 for a year now. That issue is still alive. They want to press
11 the Article 78. It is still over there.

12 The one issue, the First Amendment retaliation, they
13 do allege against us. We are not state actor. Doesn't do them
14 any good. And they don't allege against the trust. So that is
15 the end of it as far as we are concerned

16 MR. GOULD: As Mr. Friedman has summarized most of my
17 arguments, unless the Court has any specific questions, we will
18 rely on the record. I will point out, the trust did not evict
19 them from the heliport.

20 THE COURT: This is on the face of the complaint. I
21 am not making factual determinations. I am just looking to see
22 if there is an allegation that rises to the statement of a
23 claim under 1983 because that's what brings them into federal
24 court, a federal question. Isn't that right, there is no
25 diversity here? 42, U.S.C., 1983 gives me jurisdiction in this

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1 case, and there is no claim under 1983. There is no reason why
2 I should keep this case in federal court.

3 MR. FRIEDMAN: This is the third time -- three chances
4 to do this and they do not accuse the trust of any part in the
5 alleged First Amendment retaliation, and they never mention
6 First Amendment retaliation anywhere in their complaint.

7 THE COURT: Well, I have tried to identify a due
8 process claim, but I do not see any allegation that the trust
9 deprived the plaintiff of any factual allegation that shows
10 that the trust, which is the state actor, deprived the
11 plaintiff of due process of law. Accordingly, there is no
12 viable claim of a federal wrong.

13 I will give you one more opportunity to try to focus
14 on the only federal claim that you can make and allege facts
15 sufficient to state a claim against the trust, which is the
16 only state actor here. The only state actor we have here is
17 the trust. There is a lot of vituperation, but that is not
18 what shows a violation of 1983.

19 Accordingly, I grant the motion to dismiss the
20 complaint but I will consider, if it is necessary, whether you
21 state anything that is a federal claim against the heliport
22 because you really haven't alleged anything here that makes the
23 heliport a state actor. I am satisfied that the trust is a
24 state actor. It is the heliport that I am talking about. I
25 wouldn't give leave to amend if I thought that the trust was

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1 clearly not a state actor, but you have to allege conduct of
2 the trust.

3 I grant the motion to dismiss, and I give you leave to
4 amend the complaint only against the trust because I do hold
5 that the trust is the only state actor here.

6 Air Pegasus, we are going to leave them until I see
7 whether I have jurisdiction of this action.

8 I will give you leave to file by no later than April
9 25, giving you a lot of time, but that doesn't mean that you
10 should put more in. It means that you could focus on what you
11 put in.

12 MR. HANTMAN: Thank you, your Honor.

13 THE COURT: If you can state a claim under 1983, that
14 has to be against the trust.

15 MR. HANTMAN: Thank you, your Honor.

16 THE COURT: Very well. By no later than April 25.

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